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9 UNITED STATES DISTRICT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 NICHOLAS WILLIAM SOTO,

15 Defendant.

Case No.: 2:14-CR-0110-SMJ

16 **UNITED STATES’
17 SENTENCING
18 MEMORANDUM**

19 Plaintiff, United States of America, by and through Michael C. Ormsby,
20 United States Attorney for the Eastern District of Washington, and James A.
21 Goeke, Assistant United States Attorney, submits the following sentencing
22 memorandum:

23 **I. CONVICTION AND BACKGROUND**

24 The sentencing hearing in this matter is currently set for April 28, 2015 in
25 Spokane, Washington at 1:30 p.m. Defendant NICHOLAS WILLIAM SOTO
26 (“SOTO”) faces sentencing following his January 13, 2015 guilty plea to Count
27 Two of the Indictment charging the Defendant with Production of Child
28 Pornography, in violation of 18 U.S.C. § 2251(a). The Defendant entered his
guilty plea pursuant to a written Plea Agreement. The following facts, as set forth

1 below from the Plea Agreement, constitute the factual basis for the Defendant's
2 conviction:

3 On August 8, 2014, Department of Homeland Security
4 Special Agents executed a federal search warrant at
5 Defendant NICHOLAS WILLIAM SOTO's residence in
6 Spokane, Washington. The search warrant was based on
7 the discovery of a child pornography image posted on a
8 foreign website that depicted a female child
9 approximately 6-10 years old performing oral sex on an
10 adult male. The child pornography image was posted
11 using a unique internet IP address from the Defendant's
12 residence in Spokane, Washington and was posted to an
13 online account associated with the email address
14 "blackdragon69134@gmail.com". The federal search
15 warrant authorized the seizure of evidence regarding
16 violations of 18 U.S.C. § 2252A(a)(2) (Receipt and
17 Distribution of Child Pornography); 18 U.S.C. §
18 2252A(a)(5)(B) (Possession of Child Pornography); and
19 18 U.S.C. § 2251(a) (Production of Child Pornography).

20 During the execution of the search warrant, agents
21 encountered the Defendant, NICHOLAS WILLIAM
22 SOTO, and advised him of his *Miranda* rights.
23 NICHOLAS WILLIAM SOTO acknowledged his rights
24 and agreed to answer questions. During a recorded
25 interview, NICHOLAS WILLIAM SOTO made the
26 following admissions to Homeland Security Special
27 Agent Rodney Weekes: Special Agent Weekes asked the
28 Defendant why he believed a search warrant was
executed at his residence, to which the Defendant replied,
probably for the child pornography on his laptop
computer. Special Agent Weekes asked NICHOLAS
WILLIAM SOTO to explain, and the Defendant stated
that lots of people had been sending him child
pornography via the internet. NICHOLAS WILLIAM
SOTO further admitted that he was the sole user of his
personal laptop computer, though his girlfriend had used
the laptop on a few occasions. NICHOLAS WILLIAM
SOTO also stated that he had owned his laptop computer

1 for approximately two to three years. NICHOLAS
2 WILLIAM SOTO stated that he used a secured Windows
3 user profile and password to access the computer, and
4 that only he and his girlfriend knew the Windows user
profile password.

5 When asked to further explain how he had obtained child
6 pornography on his laptop computer, NICHOLAS
7 WILLIAM SOTO stated that people had been sending it
8 to him via email, but that after viewing it he always tried
9 to delete it. The Defendant stated that his email address
10 was "blackdragon69134@gmail.com", the same email
11 address associated with the online account where the
12 child pornography image was posted. The Defendant
13 also stated that he had received child pornography image
14 files from a photo sharing website. Special Agent
15 Weekes asked NICHOLAS WILLIAM SOTO if he had
16 ever uploaded any image files to the website that he had
17 mentioned, to which the Defendant stated that he had
18 uploaded a few images on one occasion but that they
19 were images that he had received from someone else.
20 Special Agent Weekes advised NICHOLAS WILLIAM
SOTO that he had seen one image that depicted a minor
female conducting oral sex on an adult penis and that he
believed, based on clothing discovered in the
Defendant's residence, that it was the Defendant's penis
in the image. NICHOLAS WILLIAM SOTO then began
to cry and state that his life was ruined.

21 Special Agent Weekes asked NICHOLAS WILLIAM
22 SOTO who was depicted in the image he uploaded to the
23 internet and the Defendant advised agents of the identity
24 of the minor female child. The Defendant also stated that
25 he was depicted in the image in which a minor female
26 was conducting oral sex, but claimed that it was a joke,
27 that it was not his penis in the image but his thumb.
28 When asked again, NICHOLAS WILLIAM SOTO
admitted that his penis was depicted in the image. The
Defendant explained that on July 26, 2014, two six (6)
year old twins stayed at his apartment with he and his

1 girlfriend for a couple of days. On the night of July 26,
2 2014, after his girlfriend and brother (who also resides at
3 residence) had gone to bed, NICHOLAS WILLIAM
4 SOTO took photographs of the twins, to include the
5 image of one of the twins conducting oral sex on his
6 penis. NICHOLAS WILLIAM SOTO claimed that the
7 two (2) minor female children did not know that he took
8 the pictures of them because he did it when they were
9 asleep. The Defendant also claimed that the minor
10 female child that conducted oral sex on his penis was
11 unaware of what was happening because he blindfolded
12 her, as a game, and told her that what he was putting in
13 her mouth was candy. NICHOLAS WILLIAM SOTO
14 claimed that he only put his penis in the minor child's
15 mouth for a short time. NICHOLAS WILLIAM SOTO
16 claimed that this was the only time that he has had sexual
17 contact with any minor.

18 Finally, a media card was found in NICHOLAS
19 WILLIAM SOTO's computer. Both the computer and
20 media card were seized pursuant to the search warrant.
21 Forensic review of the media card revealed the child
22 pornography image described above, as well as other
23 child pornography images involving the display of the
24 genitalia of one of the female victims noted above, on the
25 media card.

26 ECF No. 45 at 5-8. The procedural history and additional facts of this case are also
27 set forth in the Presentence Investigation Report ("PSR"). ECF No. 58, ¶¶ 1-15.

28 **II. GUIDELINE BASE OFFENSE LEVEL AND ENHANCEMENTS**

The PSR includes a calculation of the Defendant's offense level, criminal history, and resulting range of imprisonment under the United States Sentencing Guidelines ("USSG"). ECF No. 58, ¶¶ 19-44; 85. Pursuant to the PSR, the Defendant's adjusted base offense level is 39 and his criminal history category is I. ECF No. 58, ¶ 85. The United States agrees with the calculations in the PSR and has no objections to the PSR. Based on the calculations in the PSR, the Defendant

1 faces an advisory sentencing range under the USSG of 262 to 327 months
2 incarceration and 5 year to lifetime term of supervised release. ECF No. 58, ¶ 85.
3 The United States agreed, however, pursuant to Federal Rule of Criminal
4 Procedure 11(c)(1)(C) to recommend a sentence of incarceration no higher than
5 240 months.

6 **III. GUIDELINE DEPARTURES**

7 In the United States' view, there are no upward or downward departures that
8 apply in this matter under the USSG. As previously noted, however, pursuant to
9 Rule 11(c)(1)(C) the United States agreed to recommend a sentence of
10 incarceration no higher than 240 months. The United States sentencing
11 recommendation is informed by the Defendant's agreement pursuant to the Plea
12 Agreement to plead guilty to charges of Rape of a Child in the First Degree in
13 Superior Court. ECF No. 45 at 3. The United States understands that the
14 Defendant will be charged with the state offense prior to the sentencing hearing in
15 this matter.
16

17 **IV. STATUTORY SENTENCING FACTORS**

18 In United States v. Booker, 543 U.S. 220, 245 (2005), the Supreme Court
19 excised the provisions that made the Guidelines mandatory, and thus "made the
20 Guidelines effectively advisory." As modified, the Sentencing Reform Act now
21 "requires a sentencing court to consider Guideline ranges, see 18 U.S.C.
22 § 3553(a)(4), but it permits the court to tailor the sentence in light of other
23 statutory concerns as well, see § 3553(a)." Id. Further, "district courts, while not
24 bound to apply the Guidelines, must consult those Guidelines and take them into
25 account when sentencing. Id. at 264; See 18 U.S.C. § 3553(a)(4)(5). "[T]he Act
26 nonetheless requires judges to impose sentences that reflect the seriousness of the
27 offense, promote respect for the law, provide just punishment, afford adequate
28 deference, [and] protect the public...." Id. at 260; See 18 U.S.C. § 3553(a)(2). In

1 United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006), the Ninth Circuit reiterated
2 that the sentencing guidelines are the starting point for a district court in
3 determining a reasonable sentence. Id. at 1169. A district court, however, must
4 not accord more weight to the guidelines than the other §3553(a) factors. Id. at
5 1171.

6 Here, based on the facts set forth in the Plea Agreement and the PSR, the
7 sentencing factors under 18 U.S.C. § 3553(a), and the analysis and discussion
8 herein, the United States believes that a sentence of incarceration of 240 months, a
9 lifetime term of supervised release with all terms and conditions noted in the PSR,
10 and a special assessment of \$100 is an appropriate sentence. The United States
11 leaves the imposition of an appropriate fine, if any, to the sound discretion of the
12 Court. The United States is also unaware of any request for restitution. The
13 § 3553(a) sentencing factors include: (1) the nature and circumstances of the
14 offense and history and characteristics of the defendant; (2) the need for the
15 sentence to reflect the seriousness of the offense, afford deterrence, protect the
16 public from further crimes and provide the defendant training and treatment; (3)
17 the kinds of sentences available; (4) the established USSG sentencing ranges; (5)
18 any pertinent USSG policy statements; (6) the need to avoid unwarranted sentence
19 disparity between defendants with similar records convicted of similar crimes; and
20 (7) the need to provide restitution to victims of the offense. 18 U.S.C. §
21 3553(a)(1)-(7). Each sentencing factor is addressed in turn below:

22
23 **A. Nature and Circumstances of the Offense and History and**
24 **Characteristics of the Defendant:**

25 The nature and circumstances of the Defendant's offense is detailed in the
26 Plea Agreement, in the discussions above, and in the PSR. The Defendant's
27 offense was horrific and requires a substantial sentence. The Defendant's criminal
28 history and characteristics are also detailed in the PSR. The Defendant's has no

1 criminal history and the Defendant's characteristics and history demonstrate some
2 significant challenges to include sexual abuse, several head injuries, and a less than
3 ideal home life. In the United States' view, a sentence of 240 months incarceration
4 is an appropriate sentence given the nature and circumstances of the offense and
5 the characteristics of the Defendant.

6 **B. Need for the Sentence to Reflect the Seriousness of the Offense,**
7 **Afford Deterrence, Protect the Public, and Rehabilitate the**
8 **Defendant:**

9 A sentence of 240 months incarceration will also reflect the seriousness of the
10 offense and afford deterrence. Again, the Defendant's offense was horrific and a
11 significant sentence of incarceration is necessary to protect the public and provide
12 deterrence. As to whether the Defendant will benefit from any educational and
13 vocational training offered to him by the Bureau of Prisons while incarcerated,
14 only the Defendant and time can answer that question.

15 **C. Kinds of Sentences Available:**

16 Based on the Defendant's criminal history and adjusted offense level and
17 statute, only a sentence of substantial incarceration is appropriate. The mandatory
18 minimum sentence required for the Defendant's offense is 180 months
19 incarceration.
20

21 **D. Sentencing Ranges Available:**

22 The maximum penalty for the Defendant's offense is a term of up to 30
23 years imprisonment; a fine not to exceed \$250,000; a lifetime term of supervised
24 release; restitution; and a \$100.00 special penalty assessment. The advisory USSG
25 suggest a sentencing range of 262 to 327 months incarceration and a 5 to lifetime
26 term of supervised release, as well as restitution.
27
28

E. Pertinent Policy Statements:

The United States does not believe any particular Policy Statements have special applicability to the instant case.

F. Need to Avoid Sentence Disparity:

As discussed herein, the United States believes a sentence of incarceration of 240 months and a term of lifetime supervised release is an appropriate sentence that would avoid disparity.

G. Restitution:

The United States leaves the question of restitution to the sound discretion of the Court. The United States is unaware of any restitution requests.

V. GOVERNMENT SENTENCING RECOMMENDATION

Based on the foregoing, the United States respectfully requests that the Court impose the following sentence:

- A sentence of imprisonment of 240 months;
- A term of lifetime supervised release with all of the standard and special conditions noted in the PSR;
- A \$100 special assessment; and,
- A fine as the Court sees fit.

Respectfully submitted, this 19th day of April, 2015.

MICHAEL C. ORMSBY
United States Attorney

s/ James A. Goeke
James A. Goeke
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert Cossey
920 North Monroe Street
Spokane, WA 99201

s/ James A. Goeke
James A. Goeke
Assistant United States Attorney